MEXICO – ANTI-DUMPING INVESTIGATION OF HIGH FRUCTOSE CORN SYRUP (HFCS) FROM THE UNITED STATES

Recourse to Article 21.5 of the DSU by the United States

Answers of the United States
to Questions from the Panel

March 8, 2001

13. Could the United States please specify the portions of the original panel determination referred to in paragraph 9 of the United States' oral submission?

1. Paragraph 9 of the Oral Statement of the United States was based on paragraphs 24-27 of the First Written Submission of the United States. In that discussion, the United States cited paragraphs 7.177 and 7.178 of the original Panel Report in support of the proposition that the Panel found that SECOFI's original determination did not provide any analysis to support the conclusion that there was a likelihood that users other than soft drink bottlers would substantially increase their importation of HFCS.

14. In paragraph 5 of its oral statement, the United States seems to express concern that SECOFI failed to focus on 1997 data in its analysis. Does the United States contend that SECOFI was obligated to base its determination on 1997 data? If so, on what basis in the AD Agreement does the United States makes this contention?

2. The concern that the United States expressed in paragraph 5 of its Oral Statement simply repeats a concern that the Panel expressed in its original report. In its original determination, as in its redetermination, SECOFI relied on the fact that HFCS imports were higher in January-September 1997 than in January-September 1996 in finding that there was a likelihood of increased importation. Because the January-September 1997 data do not reflect the operation of the restraint agreement – which was not announced until September 1997 – the Panel concluded that this data did not support SECOFI's conclusion, under Article 3.7(i) of the AD Agreement, that substantial increases in HFCS imports were likely after September 1997. As the Panel stated in paragraph 7.176 of its original report:

> Mexico's references to the increasing trend of HFCS imports suggest that somehow SECOFI concluded that such imports would have continued increasing by inertia, given the significant increases recorded during the period of investigation and through September 1997, even if they were not demanded in significantly increased quantities by soft-drink bottlers, the leading consumers of imported HFCS. Mexico points out that the alleged restraint agreement was made after the period of investigation, and thus any limitation on imports started from the already significantly increased levels that had been reached. However, the question for purposes of analysis is not the level of imports already reached, but the likelihood of **increased** imports. (Emphasis in original).

3. As the United States indicated in paragraphs 5 and 6 of its Oral Statement and paragraph 29 of its First Written Submission, one reason that the analysis of the restraint agreement in SECOFI's redetermination is inadequate is because it fails to address these concerns of the Panel. As the Panel previously recognized, the fact that imports of HFCS increased prior to September 1997, predominantly because of increased purchases by soft drink bottlers, cannot serve as a basis for finding that purchasers other than soft drink bottlers are likely to substantially increase imports after September 1997.

15. Based on the reported 75 percent increase of imports in January-September 1997 as compared to the same period in 1996, it might be extrapolated that total imports for 1997 would increase by 75 percent over total imports for 1996, to a level of 338,000 tons. This is approximately the same level of imports predicted by SECOFI for 1997. Similarly, it appears that under the alleged restraint agreement, soft-drink bottlers could purchase 350,000 tons of HFCS, presumably all from imports, which would again be an increase of about 74 percent from 1996 levels. Putting aside the question of who would purchase these imports, does the United States maintain that the level of 1997 imports *per se* would not support a conclusion that there was a likelihood of substantially increased imports? That is, is the United States' objection to SECOFI's conclusion of substantially increased imports based on the projected level of imports or on the methodology used on the projection?

4. The United States has not made any arguments, either in the original Panel proceedings or the current proceedings, that any particular increase in import level or penetration can or cannot be substantial *per se*. The United States argues that SECOFI's methodology is not fact-based and, hence, could not serve as the basis for SECOFI's conclusion that substantially increased imports are likely. As the United States argued in paragraph 7 of its First Written Submission, the facts found by SECOFI sufficiently contradict its conclusions on redetermination so as to suggest that SECOFI cannot on its record provide a basis for finding a threat of material injury.

5. The original Panel decision, as well as Article 3.7(i) of the AD Agreement, obligated SECOFI to examine whether substantial increases in HFCS imports were likely notwithstanding the restraint agreement. SECOFI attempted to satisfy the Panel's concern by focusing on users other than soft drink bottlers. SECOFI projected that soft drink bottlers would obtain from Mexican production all quantities of HFCS that they were permitted to use under the restraint agreement, and that all Mexican HFCS production capacity would be used to supply soft drink bottlers. Redetermination, para. 58.

6. SECOFI projected that imports of HFCS by purchasers other than soft drink bottlers would increase from approximately 62,000 tons in 1996 to 350,000 tons in 1998. As the United States indicated at paragraphs 11 through 24 of its Oral Statement, as well as in responses to questions the Panel asked orally at the Meeting on February 20 and February 21, the methodology that SECOFI used to project this increase must be rejected because it is not based

on data reflecting either actual HFCS purchases by users other than soft drink bottlers or the actual rates at which these users substituted HFCS for sugar during SECOFI's period of investigation and because it is not consistent with historical trends.

16. Does the United States consider its arguments under Article 12 to constitute an independent claim of violation of the AD Agreement? In this regard, could the United States please comment on the findings of the Panel in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, circulated 30 October 2000 (appeal on other issues pending) at paragraphs 6.257 and 6.259.

7. The United States considers its arguments under Article 12 to constitute an independent claim of violation of the AD Agreement. We note that in its original decision, this Panel concluded that Mexico acted inconsistently with the substantive requirements of Article 10.2, when it applied dumping duties retroactively, and with the notice requirements of Articles 12.2 and 12.2.2. See Panel Report, paras. 7.194 - 7.198. Nevertheless, we believe it is within a Panel's discretion to decide, as a matter of judicial economy, not to reach the question of whether there has been an Article 12 violation when it has found a violation of a related substantive obligation. This appears to have been the basis for the *Bed Linen* decision. However, we would disagree with the *Bed Linen* Panel to the extent that it was suggesting that Article 12 is not an independent obligation under the AD Agreement or that there will always be an overlap between a Member's substantive obligations and its obligations under Article 12. The United States considers the transparency obligations created by Article 12 to be critical to the effective operation of the AD Agreement.